Supreme Court, U.S.
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No. 96-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DR. JOHN HAGELIN, DR. MIKE TOMPKINS,
and the NATURAL LAW PARTY OF THE
UNITED STATES OF AMERICA,
Petitioners,

v.

FEDERAL ELECTION COMMISSION and
COMMISSION ON PRESIDENTIAL DEBATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT COMMISSION ON PRESIDENTIAL DEBATES' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a party, claiming exigent circumstances, may obtain judicial relief for an alleged violation of the Federal Election Campaign Act (the "Act") within just days of filing its complaint with the Federal Election Commission (the "FEC"):

(1) despite the Act's explicit mandate that the FEC shall have "exclusive jurisdiction" for civil enforcement of the Act and requirement that no court take any action in connection with such a complaint until a 120-day period has elapsed from the filing of the complaint with the FEC;

(2) where the claimed "exigent circumstances" were wholly avoidable had the party initiated its complaint with the FEC in a timely manner; and

(3) where the judicial relief the party seeks is both beyond the statutory authority granted in the enforcement provisions of the Act and, if granted, would infringe the First Amendment rights of another party.

RULE 29.6 LIST

Respondent Commission on Presidential Debates has no parent corporation or subsidiaries.

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RESPONDENT COMMISSION ON PRESIDENTIAL DEBATES' BRIEF IN OPPOSITION

Respondent Commission on Presidential Debates respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. The opinion is reported at 97 F.3d 553 (1996).

STATEMENT OF THE CASE

A. The Commission on Presidential Debates

The Commission on Presidential Debates ("CPD") was created on February 19, 1987, as a private, not-for-profit corporation, dedicated solely to the sponsorship of general election debates and related voter education functions.

CPD receives no funding from the government or any political party.[1]

The CPD Board is jointly chaired by Frank J. Fahrenkopf, Jr., former chairman of the Republican National Committee, and Paul G. Kirk, Jr., former chairman of the Democratic National Committee. Notwithstanding Petitioners' claims to the contrary, CPD is *not* controlled by the two major political parties nor has it been operated for the purpose of strengthening the major parties. While the CPD's creation was enthusiastically supported by the then-chairmen of the major parties, it was formed and has operated as a separate and independent corporation.[2]

CPD sponsored two presidential debates during the 1988 general election and four debates during the 1992 election. In connection with the 1996 general election campaign, CPD sponsored two presidential debates and one vice presidential debate. CPD's debates have been viewed by tens of millions of Americans, and have served a valuable voter-education function. In addition, CPD has undertaken a number of broad-based, nonpartisan

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[1] CPD was created in response to two studies independently conducted by the Georgetown University Center for Strategic and International Studies and the Harvard University Institute of Politics. Both the Georgetown and Harvard reports recommended that the two major political parties endorse a mechanism designed to ensure, to the greatest extent possible, that presidential debates between the leading candidates be made a permanent part of the electoral process.

[2] Before the CPD began its operations in earnest, there were, as Petitioners note, isolated references to the CPD as a "bipartisan" effort. In context, however, such references spoke only to the efforts of the CPD's founders to ensure that it was not controlled by any one political party, not an effort by the two major parties to control the CPD's operations or to exclude debate participation by nonmajor party candidates in CPD-sponsored debates. CPD and its independent Advisory Committee have gone to great lengths to research, establish and apply a scrupulously nonpartisan procedure for selecting debate participants.

voter education projects designed to enhance the educational value of the debates themselves.

The CPD's Candidate Selection Criteria for 1996 General Election Debate Participation, which were publicly announced on October 31, 1995, were carefully designed to further the educational mission of the CPD, which is:

> to ensure, for the benefit of the American electorate, that general election debates are held every four years between the leading candidates for the offices of President and Vice President of the United States.

(Exh. 1 of Exh. I to Memorandum of Points and Authorities in Support of the CPD's Motion to Dismiss, District Court Civ. A. No. 96-2132 ("CPD's Motion").)

The CPD's candidate selection criteria are the result of much careful consideration, including input by a committee comprised of electoral experts not associated with any political party. The criteria thoughtfully addressed participation in the debates by nonmajor party candidates, recognizing the fact that, in any given presidential election year, there are scores of declared nonmajor party presidential candidates, including over 130 in 1996.

> A Democratic or Republican nominee has been elected to the Presidency for more than a century. Such historical prominence and sustained voter interest warrants the extension of an invitation to the respective nominees of the two major parties to participate in the Commission's 1996 debates.
>
> In order to further the educational purposes of its debates, the Commission has developed nonpartisan criteria upon which it will base its decisions regarding selection of nonmajor party candidates to participate in its 1996 debates. The purpose of the criteria is to identify nonmajor party candidates, if any, who have a realistic (*i.e.*, more than theoretical) chance of being elected the next President of

> the United States and who properly are considered to be among the principal rivals for the Presidency. The realistic chance of being elected need not be overwhelming, but it must be more than theoretical.

Id. The criteria designed to foster this goal set forth a number of specific indicators to be considered by the CPD's Advisory Committee and the Board of Directors. In summary,

> [t]he criteria contemplate no quantitative threshold that triggers automatic inclusion in a Commission-sponsored debate. Rather, the Commission will employ a multifaceted analysis of potential electoral success, including a review of (1) evidence of national organization, (2) signs of national newsworthiness and competitiveness, and (3) indicators of national enthusiasm or concern, to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of its debates.

Id.

In 1996, an independent Advisory Committee to the CPD's Board of Directors met to apply the CPD's candidate selection criteria in light of the facts and circumstances presented by the then-current campaign. After applying the criteria to both major and nonmajor party candidates, the Advisory Committee unanimously concluded that only President Clinton and Senator Dole and their respective running mates qualified for participation in the CPD-sponsored debates.[3] The CPD Board unanimously accepted that recommendation. Subsequently, CPD-sponsored debates were held on October 6, 9 and 16, 1996.

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[3] Petitioners suggest that CPD would not seriously consider inviting a nonmajor party candidate to participate in its debates. Petition (hereafter "Pet.") 8. The facts belie this suggestion; Ross Perot was invited to participate, and did participate, in the CPD's 1992 debates.

B. The Federal Election Commission Debate Regulations

Pursuant to the Federal Election Campaign Act of 1971 ("FECA" or the "Act"), 2 U.S.C. §§ 431-455, the Federal Election Commission (the "Commission" or "FEC") has promulgated regulations regarding the use of corporate funds to sponsor debates.[4] In their lawsuit below, Petitioners alleged that CPD had violated the FEC's regulation set forth at 11 C.F.R. § 110.13(c) ("Section 110.13(c)"). Section 110.13(c) provides in pertinent part:

> (c) Criteria for candidate selection. For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

CPD's criteria meet the requirements of Section 110.13(c) in all respects, including its requirement that the selection criteria used by debate sponsors be "objective." Petitioners rely upon a cramped construction of the phrase "objective criteria" in order to pick and choose among CPD's indicators to produce an outcome they would like. Indeed, in order to advance their decidedly partisan agenda, they assert that the FEC's regulation,

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[4] The FEC does not directly regulate debate sponsors such as CPD; nor has the FEC, in any sense, designated CPD as "the debate sponsor," contrary to the Petitioners' suggestion. Pet. 5. Rather, the FEC, pursuant to the Act, regulates campaign contributions and election expenditures. The FEC has issued regulations enabling a defined class of organizations, including organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, to sponsor debates "without being deemed to have made prohibited corporate contributions to the candidates taking part in [the] debates." 60 Fed. Reg. 64,260, 64,261 (1995) (commenting on 11 C.F.R. § 110.13).

11 C.F.R. § 110.13(c), permits only criteria that may be wholly mechanically applied.[5]

The FEC's regulations simply are not the anti-debate straitjacket Petitioners maintain. The regulations do not define the phrase "objective criteria" at all, and certainly do not define the phrase as Petitioners would.[6] CPD's criteria are objective within the ordinary meaning of that term. *See, e.g., Webster's Third New International Dictionary* 1556 (1986) (objective means "independent of what is personal or private in our apprehension and feelings: of such nature that rational minds agree in holding it real or true or valid"). CPD's "realistic chance of being elected" standard, which bears an obvious and rational relationship to the educational purposes of the debates, comports with this standard.

CPD's criteria also comport with the purpose of the FEC regulation. Section 110.13(c) is expressly intended only to "avoid the real or apparent potential for a *quid pro quo* and to ensure the integrity and fairness of the process." 60 Fed. Reg. at 64,262. There is simply nothing in law or logic to suggest that otherwise proper criteria such as CPD's are invalid merely because they permit the exercise of some objective judgment pursuant to pre-established and published guidelines.[7]

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[5] Thus, they have advocated the strained proposition that, of CPD's criteria, only Constitutional eligibility to hold the office of President of the United States, ballot access and eligibility for matching funds from the FEC are "objective." (Verified Complaint, District Court Civ. A. No. 96-2132, at 6.)

[6] Indeed, as briefed more fully in the proceedings below, Petitioners' construction of the regulation is wholly inconsistent with the "legislative history" of the regulation.

[7] In fact, Petitioners' construction of the regulation likely would render it unconstitutional under the First Amendment on the grounds that it would not be narrowly tailored to reduce corruption or the appearance of corruption. This is the only governmental interest that is sufficiently compelling to justify restrictions on the

Petitioners also incorrectly contend that the CPD violated FEC regulations by providing an automatic invitation to the nominees of the Republican and Democratic parties. Pet. 6. Contrary to Petitioners' assertion, the nominees of the two major parties were not "automatically" invited to debate. Rather, the CPD determined that, *as of the 1996 campaign,* the "historical prominence" of, and "sustained voter interest" in, the Republican and Democratic parties warranted an extension of invitations to the nominees of those parties.[8] (CPD's Motion, Exh. I, Exh. 1.)

The FEC presently has before it Petitioners' administrative complaint, which will provide the FEC an opportunity to address the parties' differing views with respect to the proper construction of the regulation.

C. The Jurisdictional Provisions Of The FECA

The narrow issue on which Petitioners seek certiorari concerns the nature of the FEC's exclusive jurisdiction over violations of the Act. The FECA provides that "[t]he [FEC] shall have exclusive jurisdiction with respect

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expression of participants in the political process. *See Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 296 (1981); *Buckley v. Valeo,* 424 U.S. 1, 14, 18 (1976). CPD as a private sponsor of debates, is, of course, a participant in the political process with important First Amendment rights of its own. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* —— U.S. ——, 115 S. Ct. 2338, 2348 (1995).

[8] Moreover, even if the CPD did extend invitations to the major party candidates based solely on their status as the party nominees, that would not—standing alone—violate 11 C.F.R. § 110.13(c). *See* 60 Fed. Reg. at 64,262 (in amending the regulations, the FEC made clear that it did not intend to prevent a staging organization from providing an automatic invitation to one or both of the major party candidates, but rather to prohibit "a staging organization [*from*] *bar*[*ring*] minor party candidates . . . from participating simply because they have not been nominated by a major party") (emphasis added).

to the civil enforcement of [the Act]." 2 U.S.C. § 437c (b)(1).

> Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section *shall be the exclusive civil remedy for the enforcement of the provisions of this Act.*

2 U.S.C. § 437d(e) (emphasis added). Pursuant to 2 U.S.C. § 437g(a)(8)(A),

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

As correctly recognized in the decision below, *Perot v. Federal Election Commission*, 97 F.3d 553 (D.C. Cir. 1996), the procedures set forth in section 437g(a) of the Act "must be followed before a court can intervene" in a dispute over the enforcement of the Act. Petitioners' Appendix (hereafter "Pet. App.") A10.

D. Petitioners' Lawsuit

1. *The District Court Ruling*

Despite the clear jurisdictional framework of the FECA, Petitioners filed a lawsuit in the district court challenging CPD's compliance with the Act less than ten days after filing their complaint with the FEC. Petitioners' lawsuit against the FEC and CPD, which sought preliminary injunctive relief, was consolidated for argument along with a similar action filed by Ross Perot and his running mate and campaign organization. After extensive briefing and a lengthy hearing on October 1, 1996, the Honorable Thomas F. Hogan of the United States District Court for the District of Columbia carefully considered all argu-

ments raised by the plaintiffs and rejected them. Judge Hogan issued a lengthy bench ruling denying plaintiffs' requests for a preliminary injunction and dismissing their lawsuits. *See* Pet. App. A16-A33. The district court held, *inter alia*, that the FECA vested exclusive jurisdiction in the FEC to investigate and remedy alleged violations of the Act and FEC regulations. *Id.* at A24. The district court also held that the remedy plaintiffs sought—including an order requiring CPD to change its criteria—would exceed the court's power, in addition to disrupting or preventing the scheduled debates. The court treated the defendants' motions to dismiss as motions for summary judgment and granted summary judgment for defendants as a matter of law.

2. *The Court of Appeals' Ruling*

The United States Court of Appeals for the District of Columbia Circuit granted plaintiffs expedited review. On October 4, 1996, after briefing and oral argument, the Court of Appeals affirmed the district court's dismissal of plaintiffs' claims. The court's written opinion declared that "Congress could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA," and found that "a court is not free to disregard that congressional judgment." Pet. App. A8, A10. Moreover, the court recognized that, "[e]ven if we could somehow ignore the jurisdictional requirements of § 437g(a), Dr. Hagelin could not achieve the result he seeks." *Id.* at A10 (citation omitted). Specifically, the court recognized that, even if the jurisdictional requirements of section 437g(a) could somehow be ignored, the court did not have the power to compel the FEC to enforce its regulations in the manner that Petitioners interpreted them. Rather, "[w]hen the FEC's failure to act is contrary to law, we have interpreted § 437g(a)(8)(C) to allow nothing more than an order requiring FEC action." *See* 97 F.3d at 559 (mistran-

scribed at Pet. App. A10-A11). In addition, the court acknowledged that an order preventing CPD "from staging the debates or from choosing debate participants" would run afoul of the First Amendment principles that protect against prior restraints and allow speakers to choose the content of their speech. Pet. App. A11 (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, —— U.S. ——, 115 S. Ct. 2338 (1995)).

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners' brief deals primarily with jurisdictional issues under the FECA. Respondent CPD intends the arguments raised herein to supplement those presented by the FEC with respect to the jurisdictional issues.

I. PETITIONERS' ARGUMENTS IN FAVOR OF GRANTING THE WRIT ARE BASED ON AN INTERPRETATION OF THE DECISION BELOW THAT CANNOT BE SUPPORTED BY THE RECORD

Petitioners argue that the Court of Appeals (1) incorrectly interpreted *McCarthy v. Madigan*, 503 U.S. 140 (1992), as "abolishing all exceptions to statutory exhaustion" in all cases, (Pet. 13), and (2) ignored established precedents, (*id.* at 9), in rejecting Petitioners' claims. Petitioners err.

In the Court of Appeals, Petitioners asserted that the court "may ignore [the FECA's] elaborate statutory requirements and force the FEC to act immediately because otherwise [Dr. Hagelin] would suffer irreparable harm." Pet. App. A9. When rejecting this claim, the Court of Appeals began its discussion by stating that its own decisions, not *Madigan*, required its rejection of Petitioners' claims:

> To [rule for plaintiffs], however, would place us in conflict with our own decision in *In re: Carter-Mondale Reelection Committee, Inc.*, 206 U.S. App. D.C. 133, 642 F.2d 538 (D.C. Cir. 1980). *Carter-Mondale* is, as the FEC argues, directly on point.

Pet. App. A9.

To be sure, the Court of Appeals did cite *Madigan*, but it did so in support of its view of its own prior *dicta* in *Carter-Mondale*. That *dicta* suggested that there "might be extraordinary circumstances allowing a party to 'hurdle the explicit time constraints of the [Federal Election Campaign] Act.'" *Id.* at A10 (quoting *Carter-Mondale*, 642 F.2d at 543). In its decision in the instant case, the Court of Appeals clarified that, absent a challenge to the Act's requirements as unconstitutional, which Petitioners did not advance, there could be no such avoidance of the Act's provisions. Pet. App. A10 (where "Congress specifically mandates, exhaustion is required") (quoting *Madigan*, 503 U.S. at 144).[9]

Thus, the Court primarily relied on its own prior decision in *Carter-Mondale* in deciding the case, and noted that its precedents were consistent with *Madigan*. Accordingly, the major premise of Petitioners' brief—that the Court of Appeals "disregarded precedent and incorrectly extended this Court's decision in *McCarthy v. Madigan*," (Pet. 9)—cannot be supported by the plain language of the decision below.

II. PETITIONERS' MANUFACTURED "CONFLICT" IS NOT SUPPORTED BY CASE LAW

Petitioners have attempted to create the appearance of a conflict between the decision below and other case law. However, Petitioners not only fail to point out a conflict

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[9] The Court of Appeals further recognized that, *with respect to the FECA*, Congress's grant of exclusive jurisdiction to the FEC "is as specific a mandate as one can imagine." Pet. App. A10.

between the Circuits, they fail even to cite a single case decided as they would have this Court rule. Petitioners primarily rely on *dicta* from *Carter-Mondale*, which, as noted, the Court of Appeals itself has now explained, and cases involving statutes other than, and distinguishable from, the FECA. Petitioners' strained attempt to present a conflict to this Court merely serves to emphasize that there are no conflicting decisions with respect to jurisdictional provisions of the FECA.

Petitioners have not cited a single case enforcing the Act in which a court waived the Act's very explicit jurisdictional requirements. In fact, no court has ever held that the FECA's prerequisites for a private right of action may be excused. Lower courts have consistently applied the FECA's exclusive jurisdiction requirement with full force. *See Carter-Mondale*, 642 F.2d at 543 (declining to hear case because matter was within exclusive jurisdiction of FEC); *In re Federal Election Campaign Act Litig.*, 474 F. Supp. 1051, 1053 (D.D.C. 1979) ("this Court lacks jurisdiction over [this] complaint" because the plaintiff did not allege compliance with statutory prerequisites). Indeed, this Court itself has recognized that FECA's prerequisites must be satisfied. *See Federal Election Comm'n v. National Conservative Pol. Action Comm.*, 470 U.S. 480, 488 (1985) ("If, *and only if*, the FEC failed to obey such an order [finding it acted contrary to law], could the [complainant] Democrats bring a civil action directly against the [respondent] PACs to remedy the violation charged in their complaint.") (emphasis added). There simply is no conflict among courts with respect to the application of FECA's jurisdictional requirements.

In a seeming attempt to manufacture some conflict between the Circuits, Petitioners cite a laundry list of cases involving *other statutes*. *See* Pet. App. A35-A37 (setting forth judicial interpretation of exhaustion requirements under a number of statutes, none of which

contains the clear Congressional mandate of exclusive jurisdiction found in the FECA). These cases involving different statutes, language and considerations are inapposite to Petitioners' attempt to enforce the FECA and related regulations.

III. THE PETITION SHOULD BE DENIED BOTH BECAUSE OF PETITIONERS' DELAY AND IN LIGHT OF INDEPENDENT BASES CITED BY THE COURT BELOW FOR DENYING THEIR REQUEST FOR RELIEF

Assuming, *arguendo,* that there ever can be an exception to the clear statutory requirements of the FECA under extraordinary circumstances, these Petitioners do not merit special treatment.

First, Petitioners' argument that their compliance with the Act's jurisdictional requirements would be "futile" is undermined by their inexcusable delay in seeking relief. Petitioners waited over six months after the announcement of CPD's 1996 candidate selection criteria before filing a complaint with the FEC alleging that the criteria were facially invalid. Petitioners cannot use their own delay in challenging CPD's candidate selection criteria before the FEC as an excuse to disregard statutorily mandated procedures. *See Durkin for U.S. Senate Comm. v. Federal Election Comm'n,* Fed. Election Camp. Fin. Guide (CCH) ¶ 9147, 51,112, 51,116 (D.N.H. 1980) (rejecting futility argument when plaintiff waited for months before initiating an FEC investigation).

Second, as the Court of Appeals correctly recognized, it could not simply order the FEC, in the first instance, to enforce its regulations in accordance with the interpretation urged by the Petitioners. "When the FEC's failure to act is contrary to law [the Act] allow[s] nothing more than an order requiring FEC action." 97 F.3d at 559 (mistranscribed at Pet. App. A10-A11). Given the Petitioners' delay in filing their legal proceedings and the then-

imminent debates, there was no possibility of the FEC being able to take even expedited action that would have afforded relief to Petitioners.

Third, relatedly, the Court of Appeals recognized that the only order that would provide meaningful relief to Petitioners would be constitutionally suspect. The court stated that:

> if this court were to enjoin the CPD from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the CPD's First Amendment rights. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (prior restraint); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* —— U.S. ——, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (speakers' choice of content).

Pet. App. A11.

Because of Petitioners' delay and these independent, meritorious grounds supporting the decision below, a grant of certiorari to review alleged defects in the holding is not warranted.[10]

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[10] Petitioners summarily state that the case is not moot because it should be deemed capable of repetition yet evading review. *See* Pet. 15. This proposition is not at all evident given the pending FEC proceedings. There is no cognizable reason to assume that the FEC will not have addressed the Petitioners' administrative complaints well before the next election. Thus, it is difficult to conceive that Petitioners could legitimately find themselves similarly situated in connection with the general election campaign in the year 2000.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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